

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIFFANY DAWN DOLL,

Appellant.

No. 38128-1-II

UNPUBLISHED OPINION

Houghton, J. — Tiffany Doll appeals her convictions for unlawful possession of a controlled substance, unlawful delivery of a controlled substance with a school bus route stop enhancement, first degree theft, unlawful possession of a controlled substance with intent to deliver with a school zone enhancement, witness tampering, and two counts of bail jumping. She raises a number of arguments, including ineffective assistance of counsel. We agree that counsel provided ineffective assistance when he failed to object to the introduction of improper opinion and vouching testimony. Accordingly, we affirm the two bail jumping convictions and reverse and remand the remaining convictions.

FACTS

While on patrol on November 24, 2007, Sheriff Deputy Cory Manchester checked the license plate number of a vehicle travelling on the roadway. The license plate check identified Doll as the vehicle's registered owner. Manchester confirmed that she had an outstanding arrest

warrant and that her driver's license was suspended. He then stopped her car.

Manchester approached the driver, identified her as Doll, and detained her for third degree driving while license suspended and for an outstanding warrant. He searched her and placed her in the back of his patrol car. Then, he contacted the passenger still seated in Doll's vehicle. The passenger initially identified herself as "Nichole Brasch." Clerk's Papers (CP) at 54. He asked her to step out of the vehicle and to take any of her belongings. She left the vehicle holding a black purse.

Manchester searched Doll's vehicle incident to her arrest. Inside a duffle bag in the back seat, the search revealed a backpack containing a public transportation identification card issued to Candace Brasch and bearing a picture of Doll's passenger. The backpack also contained several syringes.

Manchester again spoke with Doll's passenger, who admitted her name was Candace Brasch. A state trooper on the scene arrested her on outstanding misdemeanor arrest warrants. A search of her purse incident to arrest revealed several plastic containers containing methamphetamine. After Manchester read Brasch her *Miranda*¹ rights, she told him that the drugs belonged to Doll and that she had agreed with Doll's plan to place the drugs in Brasch's purse and to give the name "Nichole Brasch" to Manchester; thereby Brasch could avoid an arrest on her outstanding warrants and avoid being searched. CP at 56.

Later, Brasch agreed to work as a police informant and to arrange a controlled purchase of methamphetamine from Doll. On December 6, while meeting with Doll to retrieve some personal belongings, Doll unexpectedly gave Brasch drugs in compensation for her belief that

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Brasch would take the blame for the drugs found on November 24, 2007.

On December 10, police authorities provided Brasch with \$2,500 of recorded funds in order to purchase drugs from Doll. While under surveillance, Brasch met Doll at a gas station. The two entered the gas station bathroom and remained there for approximately 10 minutes. Doll told Brasch to give her the funds and she would meet with the male who had dropped her off, drive around the block, and return with the drugs. Instead, Doll got into a car with the male and left the area.

About one hour later, officers arrested Doll and a male companion when they arrived at her apartment. The officers recovered approximately \$1,620 of the recorded funds on her person. She consented to a search of her car. The officers discovered 3.8 grams of methamphetamine hidden in the car's engine compartment.

On January 16, 2008, Doll failed to appear for a scheduled hearing regarding these events and the trial court issued a warrant for her arrest. On January 18, she appeared and the trial court quashed the warrant. On January 23, she again failed to appear for a scheduled hearing in this matter and the trial court issued another warrant for her arrest. She appeared the following day, but the trial court did not quash the warrant as she requested.²

The State charged Doll with unlawful possession of a controlled substance, methamphetamine; unlawful delivery of a controlled substance with a school bus route stop enhancement; first degree theft; unlawful possession of a controlled substance with intent to deliver with a school grounds enhancement; witness tampering; and two counts of bail jumping.

² At trial, Doll tried to introduce evidence that she had been unavoidably delayed at a clinic and, thus, did not appear on the date scheduled.

A jury heard the matter.

At trial, Manchester testified about statements attributed by Brasch to Doll regarding the plan to hide the drugs in Brasch's purse during the November 2007 incident. Detective Duane Dobbins and Special Agent John Salazar testified about statements Brasch made and statements Brasch attributed to Doll. These statements concerned (1) drugs Doll gave to Brasch as an incentive to take the blame for the November 24 arrest, (2) plans to purchase and resell drugs together, (3) the December 10 drug purchase, and (4) Doll's attempt to persuade Brasch not to testify against her. Regarding the witness tampering charge, Dobbins testified that he had conferred with the prosecutor and that they had "determined that [the acts fell] under tampering with a witness." II Report of Proceedings (RP) at 127.

Regarding the theft charge, Dobbins testified that

Tiffany Doll conspired to steal the \$2,500 from Candace Brasch. It appeared that she used some of that money to purchase methamphetamine, because she was unemployed at the time, so how she was getting any other money was unknown, besides through drug proceeds.

II RP 176-77.

Dobbins also testified that, when evaluating Brasch's reliability as an informant, he found her relative lack of criminal history "refreshing." II RP at 79. Finally, both Dobbins and Salazar testified that Brasch's work as a police informant established her credibility. During cross-examination, Dobbins testified that Brasch "established some substantial reliability in reference to her credibility." II RP at 164. Defense counsel did not object to or move to strike any of the above testimony.

On the third day of trial, Doll attempted to call Christie Heany as a witness regarding one

bail jumping charge. She had not informed the State of her intent to call Heany as a witness until the second day of trial. She claimed that Heany would testify that Doll had appeared at a local clinic on January 24, the day after she failed to appear before the trial court. Doll also admitted that Heany would not testify regarding anyone's medical condition or history. The trial court sustained the State's objection and excluded Heany from testifying because of the late disclosure and because her testimony was insufficient to establish "uncontrollable circumstances" as a defense to bail jumping under RCW 9A.76.010(4).

The jury convicted Doll of all charges. Before sentencing, she retained new counsel, who filed a motion for a new trial and an evidentiary hearing. In the motion, Doll claimed that her original trial counsel failed to call several witnesses who would have corroborated her story and who would testify about Brasch's continued drug use in violation of her police informant agreement. The trial court denied the motion. Doll appeals.

ANALYSIS

Ineffective Assistance of Counsel

Doll contends that she received ineffective assistance of counsel. She asserts that counsel failed to raise proper objections, call certain witnesses or name them in a timely manner, and prevented her from testifying at trial. Doll argues that defense counsel's failure to object to improper opinion testimony on Doll's guilt to and to improper testimony on Brasch's credibility was ineffective assistance resulting in prejudice. We agree.

We review claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance

prejudiced her. *McFarland*, 127 Wn.2d at 334-35. We strongly presume counsel is effective, and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 335-36. To demonstrate prejudice, the defendant must show that trial counsel's inadequate performance probably resulted in a different outcome. *McFarland*, 127 Wn.2d at 335. Failure to object to improper testimony critical to the State's case may constitute ineffective assistance of counsel. *See State v. Hendrickson*, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029, *cert. denied*, 129 S. Ct. 2873 (2009).

In general, no witness may offer opinion testimony regarding the guilt or veracity of the defendant or a witness because it unfairly prejudices the defendant by invading the jury province. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009); *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Accordingly, neither a lay nor an expert witness "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). A law enforcement officer's opinion testimony may be especially prejudicial because it can have "a special aura of reliability." *Kirkman*, 159 Wn.2d at 928.

Here, law enforcement personnel gave improper opinions as to Doll's guilt. Likewise, two law enforcement officers repeatedly offered testimony that vouched for Brasch's credibility, the State's only witness to several of the charges against Doll. Defense counsel failed to object, move to strike, or ask the trial court for a limiting instruction. There can be no legitimate strategy or trial tactic here for failing to do so. Moreover, Doll suffered prejudice because the testimony

invaded the jury's role as fact finder. The remedy is to reverse and remand the convictions for unlawful possession of a controlled substance, unlawful delivery of a controlled substance, first degree theft, unlawful possession of a controlled substance with intent to deliver, and witness tampering.

With regard to Doll's bail jumping convictions, the trial court excluded Heany from testifying both for defense counsel's failure to timely disclose and because the proposed testimony failed to establish "uncontrollable circumstances" as a defense under RCW 9A.76.010(4). Thus, the trial court would have excluded Heany even if defense counsel had timely disclosed her as a witness. Doll does not challenge this basis for Heany's exclusion, and she fails to establish prejudice.

With the exception of the two bail jumping convictions, which we affirm, we reverse and remand.³

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

We concur:

Quinn-Brintnall, J.

³ Because we reverse and remand, we do not address Doll's other ineffective assistance of counsel claims. We also do not address her other arguments based on an unlawful search under *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009), the introduction of other improper testimony, or the denial of her motion for a new trial.

No. 38128-1-II

Van Deren, C.J.